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In The

Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

vs.

STATE OF OKLAHOMA,

Defendant.

On The Report Of The Special Master Dated June 29, 1990

THE STATE OF WYOMING'S REPLY BRIEF TO THE STATE OF OKLAHOMA'S BRIEF

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INTRODUCTION

The State of Wyoming submits this brief in reply to the brief on the merits filed by the State of Oklahoma in response to the exceptions to the Special Master's Report which the State of Wyoming filed.

In addition to replying to Wyoming's exceptions, Oklahoma raises several additional issues.[1] Because a

[1] Oklahoma's brief does not focus on specific findings contained in the Special Master's report. Consequently, at times it is difficult to ascertain what aspects of the Special Master's report to which Oklahoma excepts.

reply brief is limited in length, some of Wyoming's arguments which address the unconstitutionality of OKLA. STAT., tit. 45, §939 (Supp. 1986) ("the Oklahoma Act.") are of necessity abbreviated. However, all of the issues raised by Oklahoma have been exhaustively addressed by the State of Wyoming in various documents which were earlier filed in this matter and which are part of the record. The State of Wyoming took no exceptions to the Master's findings and conclusions concerning the unconstitutionality of the Oklahoma Act.

SUMMARY OF THE ARGUMENT

The Special Master's Report of June 29, 1990 ("Tone Report") should be accepted by the Court. There is no basis on which the Court can uphold the Oklahoma Act, because it directly and inappropriately impinges upon interstate commerce.

The State of Wyoming has been injured by the Oklahoma Act to such an extent that it is appropriate for this Court to determine that Wyoming has standing to bring this original action.

ARGUMENTS

I. WYOMING HAS STANDING TO BRING AN ORIGINAL ACTION AGAINST OKLAHOMA.

The State of Wyoming brought this action to defeat protectionist legislation which violates Article I, Section 8, Clause 3, of the United States Constitution.

Oklahoma has repeatedly challenged Wyoming's standing. Oklahoma first raised this issue in opposition to Wyoming's Motion for Leave to File Complaint. This Court implicity rejected Oklahoma's argument and granted Wyoming permission to file the Complaint. *State of Wyoming, Plaintiff v. State of Oklahoma, Defendant*, No. 112, 487 U.S. 1231 (1988). After Wyoming's Complaint was filed, Oklahoma filed a Motion to Dismiss, based on the standing issue, which the Court denied again. *State of Wyoming, Plaintiff v. State of Oklahoma, Defendant*, No. 112, 488 U.S. 921 (1988). While this should have been an end to the issue, Oklahoma made another standing argument as part of its Motion for Summary Judgment, without any evidence supporting its argument that Wyoming was not injured by the Oklahoma Act. The Special Master rejected the Oklahoma argument. Tone Report, at 13, 34. Now, for a fourth time, Oklahoma brings this issue before the Court in its brief on the merits.

A. Wyoming has suffered direct injury as a result of the Oklahoma Act.

Oklahoma argues that Wyoming should not be granted standing to bring this suit because the effect of its legislation on the State of Wyoming is derivative, rather than direct. The injury suffered is further characterized as de minimis. Oklahoma cites no authority to support this view.

The Special Master relied on *Maryland v. Louisiana*, 451 U.S. 725, 734-35 (1981) and concluded that Wyoming's loss of severance tax revenues "fairly can be traced" to the Oklahoma Act, which constituted a direct injury of

the sort necessary to confer standing. An analysis of his decision shows it to be well supported and compelling.

The Wyoming severance tax is directly related to the extraction and sale of coal; the amount of tax collected is directly based on the amount of coal sold by Wyoming producers. The stipulated facts conclusively demonstrated that the Oklahoma Act affects the quantity of coal sold from Wyoming to Oklahoma utilities. Tone Report, at 6-7. The estimated loss in tax revenues to Wyoming is about one-half million dollars a year.[2]

Cases cited by the State of Oklahoma in its brief, *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C.Cir. 1976), *cert. denied* 429 U.S. 1977 (1976); *State of Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985), *cert. denied* 478 U.S. 1012 (1986); and *Louisiana v. Texas*, 176 U.S. 1 (1900), all involved general injuries to a state's economy which resulted in a consequential decline in general tax revenues. This case, however, represents a specific and direct injury in the form of a tangible loss of tax revenues.

Oklahoma argues that, if the Court affirms Wyoming's standing, it would "open the flood gates" and allow states to challenge the actions of other states based only upon the effect of a statute on a state's general economy and tax revenues. This overstated fear is unfounded. Wyoming's severance tax is based on coal production; the decrease in severance tax revenues can be

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[2] Wyoming submitted an affidavit from Mr. Richard J. Marble of the Wyoming Department of Revenue and Tax to prove this point. Oklahoma did not submit any affidavits or proof to refute this demonstration of injury.

directly traced to the Oklahoma Act. To affirm Wyoming's standing would not enlarge the jurisdictional basis and permit lawsuits based upon loss of general tax revenues.

Oklahoma also argues in great detail that the impact upon Wyoming's severance tax revenues is minimal. However, a loss in tax revenues of $535,886.00 in 1987 and $542,352.00 in 1988 cannot be regarded as de minimis.[3] Oklahoma cites no authority for its argument that, because the loss in tax revenue represents only a small fraction of the total tax revenues, the loss must be considered insignificant. A review of the relevant facts will reinforce the position that the injury suffered by Wyoming is sufficient to support standing.

B. Wyoming has presented an important and serious issue which deserves to be heard by this Court.

This Court has observed that the nature of the plaintiff's claim may play a role in determining whether this Court will grant standing. *Maryland v. Louisiana*, 451 U.S. at 739-45. The claim must be serious and dignified. This Court has limited the exercise of its original jurisdiction to "appropriate cases." Tone Report, at 13. Further, the

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[3] The loss of any revenues used to support governmental services must be considered very serious, at least to the recipients of those revenues. Wyoming has demonstrated that any loss in tax revenues creates significant problems for continued effective governmental operations, especially during a time of recession. To paraphrase Everett Dirkson, a half million dollars here and a half million dollars there, and pretty soon real money is involved.

availability of another forum where there is jurisdiction for the named parties and where appropriate relief may be obtained is also a consideration in determining whether there is standing. *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1988).

An important issue of federalism is at stake here. Whether a state can pass a law requiring certain of its citizens to purchase a commodity produced within its borders is an issue which strikes at the heart of the commerce clause proscription against economic protectionism. The Oklahoma Act has repercussions that will be experienced beyond the instant case. As pointed out in the amicus curiae brief of the Wyoming Mining Association, other states have passed statutes or are considering statutes which would impose similar coal purchase requirements on electric utilities. The danger of Balkanization of several states is readily apparent.

The issue which the State of Wyoming brings before this Court is of a dignified, serious and important nature. Cases arising under the commerce clause of the United States Constitution have been addressed by this Court since the early days of the nation. The tendency towards economic protectionism by individual states is obviously strong, but the founding fathers realized that such protectionist efforts must be prevented so that states may function as a nation.

The appropriate forum for the State of Wyoming to raise this issue is the United States Supreme Court. Attempts of others to raise this issue in other forums

have been dismissed for lack of standing. *Northeast Oklahoma Electric Cooperative, Inc. v. Grand River Dam Authority*, Case No. C-88-127 (Dist. Ct. Craig County, Okla.), referred to in the Tone Report, at 13.

C. Oklahoma's challenge to Wyoming's standing is precluded by the law of the case.

This Court's prior rejections of Oklahoma's standing challenge constitute the "law of the case." Consequently, Oklahoma is precluded from revisiting this issue. When a court decides upon a rule of law, any such rulings must continue to govern the matter in subsequent stages of the same case. *Arizona v. California*, 460 U.S. 605, 619 (1983). The principles of repose which support the doctrine are fully applicable to original proceedings before this Court. *Arizona v. California*, 460 U.S. at 617, 619. Only in extraordinary circumstances should issues which have become the "law of the case" be reconsidered. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-817 (1988).

Oklahoma has made no showing that would justify reopening the question of Wyoming's standing. This Court's decision is not clearly erroneous nor does it work a manifest injustice. Oklahoma's standing arguments presented to the Court for the fourth time are identical to those advanced earlier. Oklahoma presents nothing new. Oklahoma's latest attempt to raise this issue should be rejected by this Court.

II. THE OKLAHOMA ACT'S DELIBERATE DISCRIMINATION AGAINST INTERSTATE COMMERCE CANNOT BE JUSTIFIED.

In its brief on the merits, Oklahoma does not specifically identify the aspects of the Report of the Special Master to which it excepts. A fair reading of the brief, however, makes it clear that Oklahoma does not challenge the finding of the Special Master that the Oklahoma Act discriminates against interstate commerce, both on its face and in its practical effect. Tone Report, at 19-21. However, Oklahoma argues that such discrimination may be justified. Apparently, Oklahoma has taken exception to that portion of the Report of the Special Master which found that the Oklahoma Act could not be justified by any purpose advanced by Oklahoma. Tone Report, at 22-29.

A straightforward reading of the Oklahoma Act demonstrates an intent to provide economic aid and comfort to the Oklahoma coal mining industry. Nevertheless, Oklahoma has attempted to advance acceptable justifications to support the constitutionality of the Act.

Oklahoma's effort to provide post hoc justifications to support the Act were found by the Special Master to be purely economic in nature. Tone Report, at 26. The arguments that the Act is necessary to assure a readily available coal supply and to avert the possibility that Oklahoma coal purchasers will be forced to rely on a single shipper of coal are unsupported by fact.

If availability of a reliable coal supply had been a concern of the Oklahoma legislature, it could have

adopted several acceptable approaches, including requiring electric utilities to maintain a stockpile of a certain amount of coal to be used only if coal became unavailable or if the price of coal changed radically in a short period. The Oklahoma legislature did not do this. Clearly, nondiscriminatory alternatives existed to address the problem of potential fuel supply shortages.

A. The Act cannot be justified as a method of conserving clean coal.

Oklahoma introduces, for the first time in this proceeding, another justification for the Act. It argues that by requiring that less Wyoming coal be burned in Oklahoma, the Oklahoma legislature has taken steps to conserve the available supply of clean coal available to its electric utilities. This curious argument is based on the fact that Wyoming coal is a cleaner fuel source than Oklahoma coal because it has a lower sulphur content.

This argument should be rejected because Oklahoma did not raise it before the Special Master. The point was never argued by Oklahoma and, consequently, Wyoming did not have the opportunity to introduce any facts regarding the future availability of clean burning, low sulphur coal.[4] Conservation of Wyoming's clean coal by

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[4] The Court may want to take judicial notice that it is widely known throughout the coal industry that the available supply of low sulphur, clean burning, sub-bituminous coal, found throughout the Powder River Basin of Wyoming, is estimated to be in excess of 110 billion tons. Geological Survey

(Continued on following page)

Oklahoma may be a laudable goal, but it cannot be the basis of upholding unconstitutional legislation.

B. Oklahoma did not attempt to prove that the purposes of the Oklahoma Act could not be achieved by nondiscriminatory means.

As a general rule, when a statute discriminates on its face, the Court may nevertheless uphold it if it serves a legitimate local purpose and there are no nondiscriminatory alternatives to the legislation. *New Energy Company v. Limbach*, 486 U.S. 269, 273 (1988); *Brown-Forman Distillers Corp. v. New State Liquor Authority*, 476 U.S. 573, 579 (1986). *Pike v. Bruce Church*, 397 U.S. 137, 141 (1970). Oklahoma has the heavy burden of proving each of these elements. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Oklahoma has not met its burden. It has not demonstrated that the Act fulfills a legitimate local purpose. Furthermore, as the Special Master pointed out, Oklahoma did not attempt to demonstrate that there were no available nondiscriminatory alternatives. Tone Report, at 24.

Both elements must be shown for a facially discriminatory statute to survive commerce clause scrutiny. Oklahoma merely offers the bare assertion that the Act has a legitimate local purpose and that there are no other means of accomplishing the Act's purpose.

(Continued from previous page)

of Wyoming, *Guidebook of the Coal Geology of the Powder River Basin*, Public Information Circular No. 14, at 126 (1980). Therefore, it is readily apparent that at current rates of extraction, Wyoming coal will be available for several hundred years.

III. THE OKLAHOMA ACT CANNOT BE JUSTIFIED AS A LEGITIMATE METHOD OF REGULATING RETAIL ELECTRIC UTILITY RATES.

Oklahoma has argued that the Act "is well within Oklahoma's authority to regulate retail rates of electric utilities." Oklahoma's brief on the merits, at 65-66. This assertion is not accurate.

A. The Act does not regulate utility rates.

While the Special Master assumed for the purpose of his decision that the Act constitutes utility rate regulation, this Court need not make such an assumption. In plain language, the Act limits the source of ten percent of the coal used by Oklahoma electric utilities. The Act "purports to exclude coal mined in other states based solely on its origin." Tone Report, at 20. Its purpose was to encourage the production and sale of Oklahoma coal, not aid Oklahoma consumers by regulating their utility rates.[5] The Act permits the increase of utility rates up to five percent. OKLA. STAT., tit. 45, §939.1 (Supp. 1986). The acceptable increase permitted by the Act is directly contrary to Oklahoma's rationale that the legislation insures lower local utility rates.

Because the Act clearly does not regulate utility rates, Oklahoma's reliance on decisions dealing with a state's authority to regulate utility rates is not relevant to the

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[5] Oklahoma has admitted that, "in advancing the interests of its rate payers, it chose also to enhance local production and availability of coal." (Response to Request Admissions, paragraph 1).

question of the constitutionality of a statute which does not regulate rates.

B. Even if the Act is assumed to regulate rates, it is not immune from Commerce Clause scrutiny.

Oklahoma argues in Proposition IV of its brief on the merits, at 55-66, that the Act does not implicate the commerce clause because it constitutes a legitimate utility rate regulation within its "lawful authority." Apparently, this argument is an exception to the Special Master's conclusion that the Act is not immune from commerce clause scrutiny as part of Oklahoma's regulation of utility rates. Tone Report, at 29-30.

While it may be true that states have some authority to regulate retail utility rates, including rates paid for electricity sold in interstate commerce, this does not mean that such utility rate regulation is immune from commerce clause scrutiny. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 393 (1983).

None of the cases cited by Oklahoma support state discrimination against the free flow of interstate commerce through the regulation of utility rates. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), allowed the regulation of wholesale utility rates, under some circumstances, by the states. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), permitted states to impose moratoriums on the construction of nuclear power plants pending a showing of adequate storage facilities for nuclear waste. The impact on interstate commerce was not even discussed. Similarly, *Central Hudson Gas & Electric Corp. v. Public*

Service Commission, 447 U.S. 557 (1980), involved the First Amendment to the United States Constitution. The issue was whether a state could ban advertising by an electric utility. In *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951), a state law requiring natural gas sellers to obtain a permit survived commerce clause scrutiny; however this Court made no statement that laws regulating utilities were immune from commerce clause scrutiny.

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982), is a useful example of "utility regulation" which violated the commerce clause. The State of New Hampshire had attempted to impose a ban on the selling of hydroelectric power by an electric utility to customers located outside New Hampshire. The Court invalidated the ban. These is no suggestion in the opinion that even a partial ban on the sale of hydroelectric power outside the state was permissible.

IV. THE SEVERABILITY DOCTRINE OF STATUTORY CONSTRUCTION CANNOT BE APPLIED TO THE OKLAHOMA ACT.

The State of Wyoming does not dispute Oklahoma's argument that a state, as a market participant, can set purchase quotas for state-owned electric utilities. Oklahoma, however, has not written such a statute. The doctrine of severability cannot be used to save the Oklahoma Act where, as in this case, it would require the extreme measure of judicially amending the language of the Act. See Corrected Exceptions of the State of Wyoming to the Report of the Special Master, at 8-12.

CONCLUSION

The Oklahoma Act is discriminatory on its face and in its practical effect. This conclusion of the Special Master is not disputed by the State of Oklahoma.

The Oklahoma Act cannot be justified as serving any legitimate local purpose. Even assuming there were any legitimate local purposes, Oklahoma failed to present evidence that there are no nondiscriminatory alternatives available to serve those local purposes.

There is no adequate justification for upholding the Oklahoma Act which is discriminatory on its face. The Act should be struck down by this Court because it violates the commerce clause of the United States Constitution. This unconstitutional legislation cannot be saved, even in part, by applying principles of severability to the wording of the Act.

Respectfully submitted,

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